

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VII

901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )

M & T Development, Inc. )  
1808 East Fifth Street )  
Washington, Missouri 63090 )

Respondent )

Proceedings under Section 309(g) of the )  
Clean Water Act, 33 U.S.C. § 1319(g) )

Docket No. CWA-07-2008-0054

CONSENT AGREEMENT  
FINAL ORDER

The United States Environmental Protection Agency (EPA), Region VII (Complainant) and M & T Development, Inc., (Respondent) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

ALLEGATIONS

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22.

2. This Consent Agreement and Final Order (CA/FO) serves as notice that EPA has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and § 1342, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region VII, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region VII (Complainant).

4. Respondent is M & T Development, Inc., a company registered under the laws of Missouri and authorized to conduct business in the State of Missouri.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, inter alia, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.

6. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

7. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

8. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.

9. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

10. 40 C.F.R. § 122.26(b)(14)(x) defines “storm water discharge associated with industrial activity,” in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan of development or sale.

11. The Missouri Department of Natural Resources (MDNR) is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

12. The MDNR issued a General Permit for the discharge of storm water under the NPDES, Permit No. MOR101-R108. This General Permit became effective on February 8, 2002, and expired on February 7, 2007 and was renewed on February 8, 2007. This General Permit governs stormwater discharges associated with construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone).

13. The MDNR issued a General Permit for the discharge of storm water under the NPDES, Permit No. MOR109xxx. This General Permit became effective on March 8, 2007 and expires on March 7, 2012. This General Permit governs Construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone and/or land disturbance activity that is reasonably certain to cause pollution to waters of the state). This General Permit also applies to land disturbance activities near valuable resource waters.

#### Factual Background

14. Respondent is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

15. At all times relevant to this action, Respondent was the owner and/or operator of a construction site known as Lake Labadie ("Site") located at the intersection of Highway T and Broken Arrow Drive in Labadie, Missouri. Construction activities occurred at the Site including clearing, grading and excavation which disturbed five (5) or more acres of total land area or which disturbed less than five (5) acres of total land area that was part of a larger common plan of development or sale.

16. Storm water, snow melt, surface drainage, and runoff water from Respondent's facility goes into an unnamed tributary of Labadie Creek. Labadie Creek empties into the Missouri River. The runoff and drainage from Respondent's facility is "storm water" as defined by 40 C.F.R. § 122.26(b)(13).

17. Storm water contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

18. The Site has "storm water discharge associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14)(x), and is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

19. Storm water contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

20. The Site has "storm water discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14)(x), and is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. Respondent discharged pollutants into "navigable waters" as defined by CWA Section 502, 33 U.S.C § 1362.

22. Storm water runoff from Respondent's construction site results in the addition of pollutants from a point source to navigable waters, and thus is the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

23. Respondent's discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

24. Respondent applied for and was issued NPDES permit coverage under the General Permit described in paragraph 12, above, for a 43-acre portion of the development, generally described as Phases I and II. MDNR assigned Respondent permit number MO-R106697, which was issued on August 20, 2004.

25. On November 8, 2006, EPA inspectors performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the discharge of storm water at the site in accordance with the CWA.

26. Respondent applied for and was issued NPDES permit coverage under the General Permit described in paragraph 13, above, for the entire 80-acre development. MDNR assigned Respondent permit number MO-R109Z94, which was issued on May 21, 2007.

#### Findings of Violation

##### Count 1

##### **Failure to Maintain Best Management Practices (BMPs)**

27. The facts stated in paragraphs 14 through 26 above are herein incorporated.

28. Part 11 of the Requirements and Guidelines section of Respondent's permit requires that the Respondent shall at all times maintain all pollution control measures and systems in good order to achieve compliance with the terms of the General Permit.

29. The EPA inspection referenced in paragraph 25 above, revealed that Respondent had not adequately maintained silt fencing.

30. The EPA inspection referenced in paragraph 25 above, revealed that Respondent had not adequately maintained curb inlet protection mechanisms.

31. Respondent's failure to properly maintain its pollution control measures is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

## **Count 2**

### **Discharge Without a Permit**

32. The facts stated in paragraphs 14 through 26 above are herein incorporated

33. Part 1 of the Applicability section of Respondent's permit states that any owner/operator of a site that will disturb one (1) or more acres and who disturbs land prior to permit issuance from MDNR is in violation of State and Federal law.

34. The inspection referenced in paragraph 25 above revealed that Respondent commenced construction and land disturbance activities in the northern portion of the site, generally described as Phase III, prior to obtaining authorization.

35. Respondent's failure to obtain a permit before commencing land disturbing activities resulted in an unauthorized discharge of stormwater without a permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

## **Count 3**

### **Failure to Install Appropriate Best Management Practices**

36. The facts stated in paragraphs 14 through 26 above are herein incorporated.

37. Part 8(e) of the Requirements and Guidelines section of Respondent's permit states that storm water runoff from disturbed areas which leave the site boundary shall pass through an appropriate impediment to sediment movement, such as a sedimentation basin, sediment trap, silt fence, etc., prior to leaving the land disturbance site. Part 8(h) of the Requirements and Guidelines section of Respondent's permit states that the SWPPP shall require a sedimentation basin for each drainage area with ten (10) or more acres disturbed at one time.

38. At the time of the EPA inspection referenced in paragraph 25 above, Respondent had not installed all necessary BMPs on site. Specifically, Respondent failed to install a sediment basin, or other equivalent BMPs, for the 25-acre drainage area north of the dam in Phase III.

39. Respondent's failure to install appropriate impediments to sediment movement is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

**Count 4**

**Failure to Properly Implement SWPPP**

40. The facts stated in paragraphs 14 through 26 above are herein incorporated.

41. Part 7 of the Requirements and Guidelines section of Respondent's permit requires that Respondent fully implement the provisions of the SWPPP throughout the term of the land disturbance project.

42. The EPA inspection referenced in paragraph 25 above, revealed that Respondent failed to implement the SWPPP. Specifically, Respondent failed to implement SWPPP provisions pertaining to implementation and maintenance of best management practices.

43. Respondent's failure to implement the SWPPP is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

**Count 5**

**Failure to Perform and Document Site Inspections**

44. The facts stated in paragraphs 14 through 26 above are herein incorporated.

45. Part 10 of the Requirements and Guidelines section of Respondent's permit requires that documented inspections be performed at a minimum of once per week on disturbed areas which have not been finally stabilized. In addition, it requires that any deficiencies be noted in a report and corrected within seven calendar days of the inspection. The report is to be kept at a site which is readily available from the permitted site until final stabilization is achieved.

46. The EPA inspection referenced in paragraph 25 above, revealed that Respondent did not perform documented site inspections at a minimum of once per week for each week during active land disturbance and did not keep all reports at a site which is readily available from the permitted site.

47. Part 10 of the Requirements and Guidelines section of Respondent's permit requires that documented inspections be performed within a reasonable time period (not to exceed 72 hours) following heavy rains.

48. The EPA inspection referenced in paragraph 25 above, revealed that Respondent did not perform documented inspections in response to every heavy rain event.

49. Respondent's failure to perform and document site inspections is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

50. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region VII hereby proposes to issue a Final Order assessing an administrative penalty against the Respondent for the violations cited above, in the amount of \$47,500.

#### CONSENT AGREEMENT

51. Respondent and EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of the Final Order portion of this CA/FO.

52. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

53. Respondent neither admits nor denies the factual allegations set forth above.

54. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal the Final Order portion of this CA/FO.

55. Respondent and Complainant agree to conciliate the matters set forth in this CA/FO without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.

56. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

57. Nothing contained in the Final Order portion of this CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

58. This CA/FO addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

59. Respondent certifies by the signing of this CA/FO that to the best of its knowledge, Respondent's facility is in compliance with all requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

60. The effect of settlement described in paragraph 58 above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 59 above, of this CA/FO.

61. Respondent agrees that, in settlement of the claims alleged in this CA/FO, Respondent shall pay a penalty of \$47,500 as set forth in paragraph 1 of the Final Order.

62. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

### FINAL ORDER

#### **Payment Procedures**

Pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and according to terms of this CA/FO, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a mitigated civil penalty of Forty-seven Thousand Five Hundred Dollars (\$47,500) within thirty (30) days of the effective date of this Final Order.
2. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

This payment shall reference docket number CWA-07-2008-0054.



Copies of the check shall be mailed to:

Sarah LaBoda  
Assistant Regional Counsel  
U.S. Environmental Protection Agency - Region VII  
901 North 5th Street  
Kansas City, Kansas 66101

and to

Kathy Robinson  
Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region VII  
901 North 5th Street  
Kansas City, Kansas 66101.

3. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

#### **Parties Bound**

4. This Final Order portion of this CA/FO shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this CA/FO.

#### **General Provisions**

5. Notwithstanding any other provision of this CA/FO, EPA reserves the right to enforce the terms of the Final Order portion of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

6. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this CA/FO.

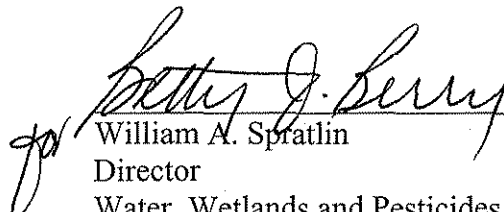
7. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

8. Respondent and Complainant shall bear their respective costs and attorney's fees.

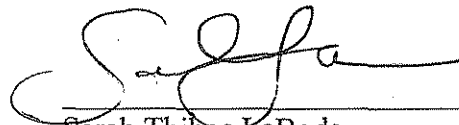
9. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY

05/20/08  
Date

  
\_\_\_\_\_  
William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency  
Region 7

5/19/08  
Date

  
\_\_\_\_\_  
Sarah Thibos LaBoda  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 7

RESPONDENT:  
M&T DEVELOPMENT INC.

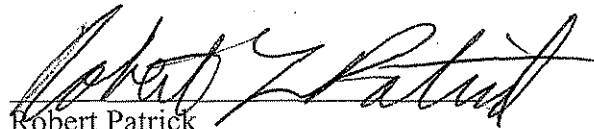
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Date

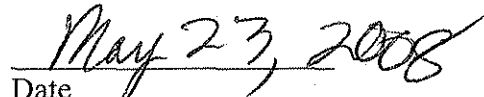
Thomas R. Alsoy

Name (Print) Thomas R. Alsoy

Title president

IT IS SO ORDERED. This Final Order shall become effective immediately.

  
Robert Patrick  
Regional Judicial Officer

  
Date

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to:

Copy hand delivered to  
Attorney for Complainant:

Sarah LaBoda  
Assistant Regional Counsel  
United States Environmental Protection Agency  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Mr. Kris Wolfe  
Wunderlich Surveying & Engineering, Inc.  
20 South Church Street  
P.O. Box 536  
Union, Missouri 63084

Sent via first class mail to:

Mr. Kevin Mohammadi, Chief  
Water Pollution Control Program  
Missouri Dept. of Natural Resources  
P.O. Box 176  
Jefferson City, Missouri 65102

Mr. Mike Struckhoff, Director  
MDNR, St. Louis Regional Office  
7545 S. Lindbergh, Suite 210  
St. Louis, Missouri 63125

5/23/08  
Date

  
Kathy Robinson